Supreme Court, U.S.
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No. 06-1017 JAN 22 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OBDULIO SANDOVAL,

Petitioner,

—v.—

RAYMOND P. MARTINEZ, in his official capacity as Commissioner of Department of Motor Vehicles, State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are non-English speaking persons residing in the State of New York, deprived of their constitutional rights under Constitution of the United States, 1st, 6th and 14th Amendments by the operation of section 301(6) State Agency Practices Act (SAPA)?

2. Does sec. 301(6) SAPA deny non-English Speaking litigants access to the court by not being able to communicate in the court, being denied equal protection of the law?

3. Does Due Process of Law encompass the opportunity to be heard and participate in the proceeding, a must to be tailored to the capacities and circumstances of those who are to be heard, the very basic requirement of Due Process?

4. Does the Constitutional right of counsel for a litigant in a tribunal; established by the State to consider the revocation of a driving license, command that counsel and client be able to communicate, failing which violate litigant's right to counsel under the 6th Amendment?

5. Is a non-English speaking litigant in a State Tribunal as member of a protected class within meaning of New York State Civil Rights law, section 40-c?

6. Does section 301 (6) SAPA mandate a means test for a litigant to appear at an adjudicatory hearing with a qualified, certified interpreter?

7. What does the word "deaf" mean within the context of an adjudicatory hearing?

8. Where there is a right to the protection of fundamental, constitutional rights as claimed by the appellant, does the State have the right to disregard those rights, claiming as a defense that those rights must yield to expense?

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Petitioner prays that a petition for a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered on the 16th day of September, 2006 denying leave to appeal to it, on the ground that "no substantial constitutional question is directly involved".

OPINIONS BELOW

The order of the Appellate Division, Second Department, affirming the lower court ruling is set forth in Appendix, *infra*, at p. 3a. The order of the Court of Appeals dissmissing the appeal is set forth in the Appendix at pp. 1a and 2a.

JURISDICTION

The order of the Court of Appeals was entered on the 20th day of November, 2006. This Court has jurisdiction to entertain this petition under 28 U.S.C. sec. 1254(1).

STATEMENT OF THE CASE

This matter originated in a civil action on submitted facts pursuant to statute, seeking a Declaratory Judgment and equitable relief, to prevent deprivation under color of law by the State of New York, depriving Appellant of his constitutional rights under the Constitution of the United States.

The Appellant, a non-English Speaking litigant, seeks to have a qualified, certified interpreter assist at an adjudicatory hearing before a tribunal convened by the Department of Motor Vehicles of the State of New York seeking to determine whether or not his license to operate a motor vehicle should be revoked for allegedly fail-

ing to consent to a blood-alcohol test as set forth in Vehicle & Traffic Law, section 1194.

The Appellant appeared at the designated tribunal hearing on January 20, 2004 with counsel. When the matter was called for trial by the Administrative Law Judge, the Appellant requested the assistance of an interpreter, since the Appellant had but a limited capacity to speak and understand English.

The Administrative Judge advised that pursuant to section 301(6) SAPA, the State would provide an interpreter only for a "deaf" person, and the accused (Appellant) could have a friend interpret for him, or hire an interpreter. Objection was made by counsel for the Appellant.

The matter was adjourned for reasons not related to the question of the interpreter and the court advised that a rescheduled date would be set by the Department of Motor Vehicles.

Thereafter a proceeding pursuant to CPLR 3222, on submitted facts, a Declaratory Judgment, was commenced in the Supreme Court, Nassau County, for a determination of the constitutional questions involved. Defendant moved to dismiss the proceeding and plaintiff opposed. The matter was submitted to the Court for disposition.

Thereafter, the Supreme Court, Nassau County, by written decision dated April 29, 2005, dismissed the proceeding, holding that the State of New York had "no obligation of constitutional proportions to provide at State expense, interpretive services to all non-English speaking participants in administrative proceedings". Further, the Court held, the failure to provide an interpreter is not a denial of Equal Protection of the Law, or a denial of Due Process of Law.

Finally, the Court determined that there "is no validity to plaintiffs claim that section 301(6) represents a denial of the right to counsel".

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision of the Court of Appeals creates a ledge of a precedent for advancing arguments to undermine the protections of the Bill of Rights, by trivializing the basic protections of individuals guaranteed to them by the Founders of the Constitution, and thus change the direction of the Country.

1. PERHAPS THE BEST WAY OF APPROACHING THE ISSUES SOUGHT TO BE RAISED IN THIS APPEAL CAN BE LIKENED TO THE HISTORY OF A SMALL NATION, WHICH PLAYED A PART IN THE ESTABLISHMENT OF THIS COUNTRY.

Holland is geographically a small nation, but its history has established a status of conduct and courage which has, and can, inspire followers. Geography has not been kind to Holland, giving it a place on this earth below sea level, prone to invasion by the turmoil of hostile seas about it. Yet, Holland thrives. Ask how?, and they can well reply, our Dikes.

The story is told of the little Dutch boy who saw a small hole in the dike protecting his community, plugged the hole with his small finger and called for Help. By plugging the small hole in the dike with his small finger until help arrived, he saved the whole structure from crumbling from the constant pounding of the surrounding hostile seas.

The similarities of example abound in the instant matter. The appellant in his recourse to the courts for pro-

tection is like the little Dutch boy, putting his finger in the hole in the dike of protection of the Bill of Rights, claiming those rights he has a right to rely on, was faced repeatedly and lastly, by the order of the Court of Appeals, who trivialized the Bill of Rights. Never in any of the lower court and Appellate rulings did any of the courts ever face head on the questions propounded by the Appellant. Indeed, the last order of the of the Court of Appeals, summarily dismissed his appeal "on the ground that no substantial constitutional question is directly involved". How such determination could be made, given that the only questions in the appeal were directly related to the 1st, 6th and 14th Amendments, somehow beggars the imagination. But perhaps most pernicious of all, was the language exhibiting the thinking of the Court in its denial, "no substantial constitutional question directly involved"! In such language, and thinking lies the seeds of erosion of the "dike" of protection which has for the last 200 some odd years, protected the fortunes and destiny of this nation. If such erosion continues unchecked now, we will pay severe penalties in the future. "Substantial"? Nowhere in the literature of the laws of this nation have such words ever been used to evaluate the rights enshrined in the Bill of Rights. "Substantial" bespeaks the market place. A weighing of Rights! Who established the weights and measures of the Rights and how they were to be weighed? Certainly not the Framers. They conceived of the Bill of Rights as a "dike" entire, each and every one of those rights supporting and protecting the other rights. To lift one right and claim it as being more "substantial" than another right would have been incomprehensible to them. Without the right of counsel, for example, what good are the other rights, such as Equal protection of the law? If Counsel was present, and Equal Protection of law was not considered substantial, the right of counsel

would be assured, but of what avail, if counsel could not argue Equal Protection of law as a substantial right?

Unfortunately, the Court of Appeals by its cavalier dismissal of the claims of the Appellant opened a Pandora's box of problems yet to be evolve. Paraphrasing Justice Frankfurter in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 594, (1952)

> "The accretion (read erosion) of dangerous power does not come in a day. It does come, however, slowly, from the generative force of unchecked disregard of the restrictions (read protections) of authority".

If we are to prevent the erosion of the protection of the Bill of Rights which would flow from the fissure in the wall of protection of those rights is the value of each and every right, the decision of the Court of Appeals must be set aside.

2. SEC. 301(6) SAPA IN ITS EFFECT DENIES APPELLANT EQUAL PROTECTION OF THE LAW.

It poses a bit of difficulty comprehending the finding of the Supreme Court, Nassau County that the challenge to sec. 301(6) SAPA, which upheld the statute finding the challenge to the statute was "abstract, not concrete". It is difficult to comprehend since the concrete effect of the statute is to foreclose anything resembling a fair trial. As Judge Pratt stated in *Sobrel-Perez v. Heckler*, 717 F(2nd) 36, 41 (1993), "Where governmental action disadvantages a suspect class or burdens a fundamental right, the conduct must be strictly scrutinized and will be upheld only if the government can establish a compelling justification for the action".

Section 40-c Civil Rights Law, N.Y. states in pertinent part:

> "1. All persons within the jurisdiction of this state shall be entitled to the equal protection of laws of this state or any subdivision thereof.
>
> 2. No person shall, because of race, creed, color, national origin, sex, marital status or disability be subjected to any discrimination in his civil rights by the state or any agency or subdivision of the state."

It cannot be argued that the petitioner is not such person, and therefore is entitled to the protections of the law and the Constitution.

It is beyond dispute that in the instant matter, no "such compelling justification" was advanced by the state for refusing petitioner the protections afforded by the constitution, both state and Federal. It is not the facial aspect of the statute that is called into question, but rather the severe curtailment of fundamental, basic, constitutional rights that takes place within the confines of the forum of the impaneled tribunal. While it is well to exalt the protections of the individual in the State and Federal Constitutions in the abstract, it is when we get to the practices of what we say with our mouths is put into effect that the protections really get to be meaningful. We can claim to the high heavens as much as we want of the vaunted rights we enjoy in our system of laws, but if we do not practice the law when the rubber meets the road, we destroy the law we profess to enjoy. It is, or should be, without cavil, that any litigant called to account before a tribunal impaneled by the State of New York should be given his/her day in court, fairly. "The fundamental requisite of due process of law is the opportunity to be heard . . . which must be tailored to the

capacities and circumstances of those who are to be heard" *Goldberg v. Kelly*, 397 U.S. 254. 267-269 (1970)

In *Yellin v. Baez*, 177 Misc. (2d) 332, (1997) a summary proceeding an adjournment was granted to the respondent to permit him to obtain an interpreter. The court there held that to deny the respondent the right to have an interpreter would violate the Equal Protection and Due Process clauses of the United States and New York constitutions. Said the court at page 336:

> "Although language by itself does not identify members of a suspect or protected class . . . it can be the basis of a finding of discrimination based on national origin when it creates a discriminatory result against all persons who do not speak English rather than persons of any particular nationality. Where governmental action disadvantages a suspect class or burdens a fundamental right, the conduct must be strictly scrutinized and will be upheld only if the government can establish a compelling justification for the action (*Sorbel-Perez v. Heckler*, 717 F. (2d) 36)"

Can it be disputed that a non-English speaking person is distinguished by his tongue to be of a certain national origin?

The court in its decision went on to hold that the denial of an interpreter burdens a fundamental right in litigation, and that right is, that a litigant to be able to understand the nature of what transpires during the course of the litigation and able to participate.

There is nothing in the statute 301(6) SAPA as cited by the Supreme Court, Nassau County to support its holding which binds the trial court to a single interpretation of what the legislature said or meant. The partic-

ular statute speaks of "deaf" persons, in an "adjudicatory" hearing, directing the agency to appoint a "qualified interpreter", certifie by a national or New York State credentialling authority to interpret the proceedings. Nowhere in the statute is there any definition or qualification as to what is meant by "deaf", or that an interpreter is to be only one specific kind. Indeed a further problem crops up as to what is meant by interpreter even for someone who is organically deaf.

The recent controversy publicized at Gallaudet University, the nations premier university for the deaf, heightened the discussion as to whether solely the American Sign Language should be for all those organically deaf. Surely it cannot be argued that there are not organically deaf persons who do not speak English, and where pray tell are there to be certified persons who can only qualify for the American Sign Language? The sanctification of the statute without any equivocation by the lower trial court opens up vast avenues of problems for generations of persons who migrate to these shores and will be facing state agencies in a variety of matters; they indeed will be left out in the cold. That cannot be, hence the decision of the lower trial court must be vacated.

The construction of the lower trial court in the matter is not to be found in the statute. There is no doubting that all of us are hostages to predetermination of one sort or another and continue with those predeterminations until or unless pause is taken to consider what the predetermination without reflection of our beliefs and thus makes us hostage to predeterminations, impervious to changes of circumstances, or probing the belief. It is submitted that the lower trial court may have based its construction of the statute in light of such predetermination, and did not consider the constitutional questions involved.

It is noted that the lower court in its decision denying the claims of the petitioner cited for its authority, *City of Cuyahoga Falls, Ohio, v. Buckeye Community Hope Foundations*, 518 U.S. 188 (2003) and *Sobrel-Perez v. Heckler*, 171 F. (2nd) 36.(1993). It is submitted that the lower court erred in holding for its authority, either of the above matters. They do not support the holding of the court.

As previously noted in the *Sobrel-Perez* matter, Judge Pratt clearly enunciated that where fundamental rights are involved, the government must establish a "compelling justification" for its action. Nowhere in the decision is there any statement of any justification offered by the government, other than to attempt to deny the constitutional questions presented.

As for the *City of Cuyhoga* case cited, the question then before this Court was one dealing with a "referendum". The question of housing was submitted to a referendum as required by statute in Ohio, and thus cannot be used as an authority to determine "intent" of the statute, hence the procedure followed for the referendum was neutral. The decision in the *City of Cuyhoga* therefore is not germane to the issues raised in the instant matter.

In the instant matter, we have a person coming from a class of persons who are entitled to protection under the provisions of the Civil Right Law of New York, 40-C, and more importantly one whose fundamental rights to a proper day in court are involved, before a tribunal impaneled by the State of New York to consider whether to revoke his license to operate a motor vehicle in the State; these fundamental rights are the cornerstones of our system of jurisprudence, of which the accused is being deprived by a statute that is both vague in its language, and difficult of construction. In either event, such

outcome falls short of the constitutional guarantees he is entitled, the denial of which cannot be justified in our system of justice.

3. THE APPELLANT HAS BEEN DENIED DUE PROCESS OF LAW BY NOT HAVING THE ASSISTANCE OF AN INTERPRETER.

> "The phrase 'due process of law' comes from Chapter 3 of 28 Edw. 111 (1355) which read 'No man of what state or condition he be, shall be put out of his lands or tenements nor take, nor disinherited, nor put to death, without he be brought to answer by due process of law.' This statute in turn, harks back to the famous chapter 29 of Magna Carta (issue of 1225) where the King promises no free man (nullua liber homo) shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroys, nor shall we come upon him or send against him, except by legal judgment of his peers or by the law of the land (per legem terrae)" *The Constitution of the United States of America, Analysis and interpretation*, 1964 Edition, p. 959

The words "due process of law" do not necessarily imply a proceeding in a Court of Justice or a plenary suite and trial by jury in every case where personal or property rights are involved *Davidson v. New Orleans*, 96 U.S. 97 (1877); *Ex Parte Wall*, 107 U.S. 265.

It is beyond dispute that sec. 301 (SAPA) relates to a hearing to which the plaintiff is invited. The statute firmly states:

> "1. In an adjudicatory proceeding all parties are afforded an opportunity for hearing within a reasonable time."

According to Black's Law Dictionary, 6th Edition, page 42, an Adjudicatory action or hearing is "before an administrative agency in which the rights and duties of particular persons are adjudicated after notice and opportunity to be heard".

"Adjudicate: To settle in the exercise of judicial authority. To determine finally synonymous with *adjudge* (so in original) in its strictest sense." *U.S. v. Irwin*, 1217 U.S. 125.

So, what the Appellant was invited to attend was a judicial process, a trial before an Administrative Law Judge, where the question involved was a license to operate motor vehicle in the State. A motor vehicle, let it be said, in the suburbs or exurbs, is a life giving tool in order to earn a living.

The question unanswered by the trial court, nor by the Appellate Courts was, where was the opportunity to be heard? since the person before the bench of the court, could not understand what was transpiring in the court room, nor could the Administrative Law Judge hear and understand what the accused could or would say?

What is equally puzzling and incomprehensible in the decision of the lower court, and affirmed by the appeals courts was the court's reliance on *Matter of Lizotte v. Johnson*, 4 Misc.(2d) 344 (2004). This was an Article 78 proceeding wherein the plaintiff contested the decision of an Administrative Judge who had denied the plaintiff the assistance of an interpreter at a "fair hearing" for welfare benefits. Along with questions raised in the trial before the Supreme Court, New York County, where the conduct of the hearing officer was claimed to have been "arbitrary and capricious" (which conduct the court was indeed arbitrary and capricious), the court focusing on

the matter of Due Process raised at the trial had this to say at page 341-342:

> "The failure of the hearing officer to require that all of the testimony of the ACS representative and the discussions between the hearing officer and the representative be translated . . . deprived the petitioner of fundamental due process. For all intents and purposes, petitioner might as well have not been in the room for the period of time during which the hearing officer accepted from the ACS representative the documents that would ultimately form the basis for the adverse decision.
>
> To require the (tenant) to proceed when it is obvious that an interpreter is needed would violate due process of law.
>
> As language is the principal means of communication in a trial or a hearing, a litigant's ability to understand and communicate that language is critical to the proceeding's fairness. The failure to prove adequate translation services here deprived the petitioner of fundamental due process
>
> . . .For all intents and purposes, petitioner might as well have not been in the room for the period of time during which the hearing officer accepted from the ACS representative the documents that would ultimately form the basis for the adverse decision.
>
> The failure of the hearing officer to . . . ensure that the hearing was conducted in compliance with the minimum requirements of due process deprived petitioner of her right to a fair hearing and due process of law".

Unfortunately, not the trial court, nor the appellate courts in the instant matter took note of the very author-

ities relied on by the trial court, which really were counter to its finding. Further, the questions raised in this case of denial of due process were never addressed by any of the courts in New York.

Section 301 SAPA expressly states that the accused in entitled to a hearing. Further the statute provides that when "deaf" persons appear at an adjudicatory hearing, qualified, certified interpreters are required. Not just anyone can do as an interpreter, but the statute clearly recognizes that the interpreter must be qualified and certified. The lower trial court in its decision held that "There is no question that plaintiff was given an opportunity to provide his own interpreter both by notice setting the matter down for a hearing, and the Administrative Law Judge. The stipulated facts are silent as to plaintiff's ability to pay . . ."

It is clear that the trial court not only failed to consider what "deaf" means in the statute, but it went on to establish a "means" test, which is nowhere set out in the statute. The very idea that the financial ability of a party to a litigation instituted by the State requiring an examination as to the means of the of the party, by someone who is not appearing as a poor person, demeans our system of justice. In that sense alone, the lower trial court committed grievous fatal error. It is submitted that our society committed to due process of law, does not look to the financial ability of the accused to afford due process of law.

As to the right of an accused to bring someone, anyone, to act as an interpreter, the statute mandates that an interpreter be qualified and certified. A hearing in court is a complex matter, and as was observed by this Court in *Powell v. Alabama*, 287 U.S. 45, (1932) "Even the intelligent and educated layman has small and sometimes no skill in the science of law".

As Judge Weinstein observed in *U.S. v. Mosquera*, 816 F.Supp. 171, 175 (1983):

> "Each English speaking "citizen" of the United States is outraged and belligerent when he reads of problems encountered by a fellow citizen involved innocently or otherwise in crime in a foreign country . . . sentenced in a 'foreign' legal system . . . and not able to understand any of the testimony against him"

It is only by considering these concerns can the courts determine whether the State has met its "fundamental requirement of due process, the opportunity to be heard at a meaningful time and in a meaningful manner". *Matthews v Eldridge*, 424 U. S. 319, 333 (1976) "If a witness is incapable of communicating in English, the right to have his testimony translated into an intelligible language is a part of his right" *Benjamin v. Greiner*, 296 F. Supp (2d) 321,333.(2003)

4. THE APPELLANT'S RIGHT TO ASSISTANCE OF EFFECTIVE COUNSEL GUARANTEED HIM BY THE SIXTH AMENDMENT IS ABRIDGED WITHOUT THE PRESENCE OF AN INTERPRETER SO THAT COUNSEL AND CLIENT CANNOT COMMUNICATE, WHICH IS "STRUCTURAL ERROR".

It is the contention of the Appellant that by denying the plaintiffs request for the assistance of a qualified, certified interpreter, such denial impacted his right to effective assistance of counsel. In its decision, the lower court stated, "There is no validity to plaintiffs claim that sec. 301(6) represents a denial of right to counsel".

The notice sent out to the Appellant to appear before the State Tribunal advised of his right to counsel, "You are permitted to appear with counsel".

In *Arizona v. Fulmnante*, 499 U.S. 279 (1991) this court divided constitutional error into two classes, "trial error" (errors occurring during the presentation of case) and "structural defects" (not harmless error standards, because they affect the framework within which the trial takes place). Such errors occur whenever there is a charade of the physical appearance of counsel, but such appearance physical appearance is meaningless where counsel and client cannot communicate, and violates the fundamental requisites of the Sixth Amendment *U.S. v. Gonzalez-Lopez*, __ U.S. __, 126 S.Ct. 2557 (2006). Such violation is fatal; where there is no effective representation by counsel it is a structural defect. In *State ex. rel. Deborah G. v. Doe*, 75. A.D. (2d) 810; appeal dismissed 50 N.Y. (2d) 1042, (1980) appeal dismissed in part 50 N.Y. (2d) 805, said the Court, "Where counsel undertakes to represent . . . such counsel must be independent and effective"

Presence of counsel at the table with his client is not meant as an empty gesture of etiquette, but a duty drawn from the corridors of history, into the Constitutions of the State of New York and the United States. Not only is it constitutionally mandated, it is plain fairness.

The job of an attorney at a hearing beside his client is an obligation by custom, history and codes of ethics to do right and good for his client." Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries" *Railroad Trainmen v. Virginia Bar*, 377 U.S.1, 7 (1964).

The lower court in its decision was preoccupied as to "state expense interpretive services which may be nec-

essary for all non-English speaking participants in administrative proceedings".

Consider what the court is saying! To the court it would seem costs override the Constitution. Do costs mean more than the Constitution? One may well question whether voting is cost effective and hence be denied constitutional protection. The route is seemingly endless if we undertake that path.

How does the failure to have an interpreter assist counsel in defending his charge and how does the absence of an interpreter impact on the defense of the client? Very simply!

An attorney charged with the duty of protecting his client's best interest is not to sit impassively as a "potted plant", but to provide unalloyed attention to the conduct of the trial, attention to the witness for the prosecution, their demeanor, their responses, questions posed to such witnesses, rulings of the court; able to confer with his client intelligently so that he can be guided to defend the client. If the attorney and the client are separated by the barrier of not being able to communicate, the client has lost his fundamental right to the assistance of effective counsel.

The lower court's consideration of costs to be borne on the part of the State for such assistance must fall when it conflicts with constitutional protections. Such as may be the costs for such assistance, it is a cost imposed on the state by the social contract between the governed and governing. Judge Weinstein in *US. v. Mosquera* (1983) (supra) at page 176 thus held: "Costs alone do not override constitutional rights, see *Gideon v. Wainwright*, 372 U.S. 335 (1963) . . . If the government cannot afford to provide due process, it must forgo the

prosecution". Is that not the very essence of Democracy we hold out to the world?

The effective assistance of counsel for the accused at a hearing where his fundamental right are at stake is a must requirement of the constitution of the United States, if we intend to continue a legacy of Democracy.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue here.

January 19, 2007

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of September 2006

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1025 SSD 54

OBDULIO SANDOVAL,

Appellant,

—v.—

RAYMOND P. MARTINEZ, &C.,

Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

STUART M. COHEN

STUART M. COHEN
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of November 2006

Present, HON. JUDITH S. KAY, *Chief Judge, presiding.*

Mo. No. 1110

OBDULIO SANDOVAL,

Appellant,

—v.—

RAYMOND P. MARTINEZ, &C.,

Respondent.

A motion having heretofore been made herein upon the part of the appellant for reconsideration of this Court's September 14, 2006 dismissal order, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

STUART M. COHEN

STUART M. COHEN
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

D10847
A/hu

___AD3d___ Argued – March 30, 2006

Anita R. Florio, J.P.
Daniel F. Luciano
Robert A. Spolzino
Steven W. Fisher, JJ

2005-06995

OBDULIO SANDOVAL,

Appellant,

—v.—

RAYMOND P. MARTINEZ, etc.,

Respondent.

(Index No. 16050/04)

DECISION & ORDER

George Nager, Mineola, N.Y., for appellant

Eliot Spitzer, Attorney-General, New York, N.Y. (Michael S. Belohlavek and Jean Lin of counsel), for respondent.

In an action, inter alia, for a judgment declaring State Administrative Procedure Act § 301(6) unconstitutional, the plaintiff appeals from an order of the Supreme Court, Nassau County (Dunne, J.), dated April 29, 2005, which granted the defendant's motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint.

ORDERED that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Nassau County, for a judgment declaring that State Administrative Procedure Act § 301(6) is constitutional.

State Administrative Procedure Act (hereinafter SAPA) § 301(6) requires the state, inter alia, to provide a qualified, certified interpreter for "any deaf person" who is a party to or a witness in an "adjudicatory proceeding before an agency." The plaintiff, allegedly a Spanish speaker with little facility with English, requested a Spanish-English interpreter when he appeared with counsel at a Department of Motor Vehicles hearing to determine whether his license should be revoked. The Administrative Law Judge denied the request on the grounds that SAPA § 301(6) did not require the state to provide such an interpreter. The plaintiff thereafter commenced the instant action, inter alia, for a declaration that SAPA § 301(6) was void on its face and unconstitutional as applied, on the ground, among others, that the statute provided interpreters for deaf persons but not for Spanish-speaking persons.

We reject the plaintiff's equal protection challenge. The distinction in SAPA § 301(6) between hearing and deaf persons is reasonably related to the goal of ensuring that deaf persons understand and can fully participate in administrative proceedings (*see Nordlinger v Hahn*, 505 US 1). Moreover, the plaintiff has not set forth any evidence showing that SAPA § 301(6), a facially-neutral statute, was enacted with discriminatory intent (*see Per-*

sonnel Administrator of Massachusetts v Feeney, 442 US 256; *People v New York City Tr. Auth.*, 59 NY2d 343).

We decline to address the plaintiff's due process claim in the absence of evidence as to whether he could afford to hire an interpreter or had any ability to understand English.

The plaintiff's remaining contention is without merit.

FLORIO, J.P., LUCIANO, SPOLZINO and FISHER, JJ., concur.

Enter:

JAMES EDWARD PELZER

James Edward Pelzer
Clerk of the Court

STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
6 Empire State Plaza, Albany, New York 12228
Division of Safety and Business Hearings, Room 312
Tel: (518-474-1509) Fax: (518-473-8505)

Case No. 04-70073

SAFETY AND BUSINESS HEARING BUREAU

In the matter of

OBDULIO SANDOVAL

Respondent

NOTICE OF HEARING

Chemical Test Refusal

Date of Hearing: May 21, 2004

Time of Hearing: 10:30 a.m.

Place of Hearing: DMV, NYS Office Building
3rd Floor - Room 3B49(2)
Veteran's Memorial Highway
Hauppauge, NY 11787

YOU ARE HEREBY GIVEN NOTICE that a hearing will be held pursuant to Section 1194 of the New York State Vehicle and Traffic Law to investigate the alleged

refusal of the above named respondent to submit to a chemical test for the purpose of determining the alcoholic and/or drug content of the respondent's blood on January 11, 2004 in Suffolk County and to determine whether respondent's license and/or driving privileges should be revoked. This chemical test inquiry is independent of the criminal court case charging you with DWI. Any revocation arising from a finding that you refused a chemical test is separate and distinct from the mandatory suspension or revocation imposed for a guilty finding from a criminal court. You may waive this chemical test refusal hearing and begin serving your revocation immediately by writing to the above address. Do not assume that a criminal plea or dismissal affects this inquiry.

YOUR PERSONAL APPEARANCE IS REQUIRED at this hearing. If you are hearing impaired, a translator will be available to you if you notify the Safety and Business Hearing in advance. Drivers involved must produce all their licenses and permits at the hearing. You are permitted to appear with counsel. You should be prepared to present all evidence and witnesses at the hearing. **If you do not personally attend the hearing, your absence will be considered your agreement to waive the hearing. This will result in immediate revocation of your license or driving privilege.**

Adjournments are not granted except for good cause based on all the circumstances. Requests for adjournments should be made to the Safety and Business Hearing Bureau, Department of Motor Vehicles, 6 Empire State Plaza Albany, N.Y. 12228 (Respondents, please refer to the enclosed information card on hearing procedures.) Contact the Bureau promptly. Do not assume an adjournment has been granted without specific confirmation. Should you require special accommodations

such as a handicap-accessible hearing site, or if you are hearing-impaired, please notify the Safety and Business Hearing Bureau in advance. An interpreter for the hearing impaired will be provided at no charge. It is your responsibility to bring an English translator if needed. **In case of inclement weather such as a snow/ice storm, please call Safety Hearing at (518) 474-1509 on morning of hearing to see if hearing is still on.**

RESPONDENT Commissioner of Motor Vehicles

NO FURTHER ADJOURNMENTS

par THE HEARING WILL START PROMPTLY Date: 4/6/04

Obdulio Sandoval
PO Box 918
Copiague NY 11726

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index # 04-16050
Dunne, J.S.C.

Return Date: February 18, 2004

OBDULIO SANDOVAL,

Plaintiff,

—against—

RAYMOND P. MARTINEZ, in his official capacity as Commissioner, Department of Motor Vehicles of the State of New York,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS REQUEST THAT THIS COURT ISSUE A DECLARATION THAT PLAINTIFF'S CLAIMS OF CONSTITUTIONAL VIOLATIONS LACK MERIT

This is a declaratory judgment action in which plaintiff also seeks injunctive relief. The sole basis for relief is plaintiff's contention that his Federal constitutional rights to equal protection, due process, and assistance of counsel have been violated because the State does not provide him with a Spanish interpreter at State expense

in an administrative proceeding pending before the New York State Department of Motor Vehicles ("DMV"). The parties have agreed that there is no dispute as to the material facts, and have agreed to present this dispute to the Court as a submission on stated facts pursuant to CPLR 3222.[1]

It is undisputed that the sole reason why the DMV administrative law judge denied plaintiffs' request for a Spanish interpreter at State expense is that there was no statutory authority for such relief, in that § 301(6) of the State Administrative Procedure Act ("SAPA") only authorizes a State interpreter, at State expense, for deaf parties or witnesses in administrative proceedings. *See*, Stipulation of Fact ¶ 7. There is no claim that the administrative law judge's denial of plaintiff's request was made because the ALJ had an intentional animus against Spanish-speaking people.

Defendant emphasizes that the United States Constitution is the sole legal basis for the relief sought by the plaintiff. Thus, his entitlement to relief depends solely upon whether his interpretation of the three provisions of the United States Constitution is correct. Since his inter-

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[1] In a declaratory judgment action, if the Court determines that the defendant's position on the underlying dispute is the correct one, "the Supreme Court should . . . [make] a declaration in favor of the [defendant] rather than dismissing the cause of action for declaratory relief" (*Committee to Stop Airport Expansion v. Town Board of the Town of East Hampton*, 2 AD3d 850, 851 [2d Dept 2003], *lv dnd* 2 NY3d 703 [2004], citing *Lanza v. Wagner* (11 NY2d 317, 334, *app dsmd* 371 US 74, *cert dnd* 371 US 901 [1962]).

See also, St. Lawrence University v. Trustees of Theological School (30 NY2d 317, 325 [1967] [Defendant "is entitled to a declaratory judgment to that effect, even though it moved only to dismiss the complaint. Under these circumstances, the proper procedure for the court is to deny the motion to dismiss the complaint (thereby retaining jurisdiction of the controversy) and then to declare the rights of the parties, whatever they may be."]).

pretation of what the United States Constitution requires is squarely foreclosed by controlling decisions of the Supreme Court of the United States, the New York Court of Appeals, and the Appellate Division, Second Department (among others), he is not entitled to any relief. All of plaintiff's challenges to the constitutionality of SAPA § 301(6) lack merit, bearing in mind that statutes are presumed to be constitutional, and that plaintiff has the burden of showing unconstitutionality beyond a reasonable doubt (1 McKinney's Statutes, § 150, pages 314-320).

1. Plaintiff's Equal Protection Claim Lacks Merit

The fact that SAPA § 301(6) provides for interpreters for deaf persons, but fails to provide for language interpreters at State expense, does not give rise to an Equal Protection violation. An Equal Protection claim requires a showing of intentional discrimination (as opposed to disparate impact) against a protected class of persons. "With respect to the equal protection cause of action, purposeful discrimination is a necessary element." *People v. New York City Transit Authority* (59 NY2d 343, 350 [1983] [citations omitted]). In that decision, the Court of Appeals cited to its earlier decision in *Matter of 303 West 42nd St. Corp. v. Klein* (46 NY2d 686 [1979]), in which it stated (at 689; boldface emphasis added):

> The underlying right asserted by petitioner is to equal protection of the laws as guaranteed by the 14th Amendment and the New York State Constitution (art I, § 11), one of the governing principles of our society. As enunciated more than a century ago in *Yick Wo v Hopkins* (118 US 356, 373-374), it forbids a public authority from applying or enforcing an admittedly valid law "with an evil eye and an unequal hand, so as practically to make unjust and

> illegal discriminations between persons in similar circumstances". We have recognized the principle in cases involving the enforcement of the criminal laws (*see People v Acme Markets*, 37 NY2d 326; *People v Goodman*, 31 NY2d 262) and the administrative regulation of public health, safety and morals (*see Matter of Di Maggio v Brown*, 19 NY2d 283; *Matter of Bell v New York State Liq. Auth.*, 48 AD2d 83). To invoke the right successfully, however, both the "unequal hand" and the "evil eye" requirements must be proven—to wit, there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was **deliberately based** upon an impermissible standard such as race, religion or some other arbitrary classification (*Matter of Di Maggio v Brown, supra*, pp 290-291; *Oyler v Boles*, 368 US 448, 456; *Snowden v Hughes*, 321 US 1, 8).

See also, Suffolk Housing Services v. Town of Brookhaven (109 AD2d 323, 334 [2d Dept 1985] [Supreme Court of the United States requires proof of "discriminatory intent or purpose" to make out a viable equal protection claim], *affd on other grounds* 70 NY2d 122 [1987]); *Marx v. Cuomo* (128 AD2d 965, 968 [3rd Dept 1987] ["A complaint under 42 USC § 1983 based upon equal protection grounds requires proof of purposeful or invidious discrimination"]).

An equal protection claim that a State statute creates different impacts on different groups of people is not sufficient as a matter of law. Equal protection violations require a showing of intentional discrimination, not merely disparate impact. Plaintiff does not contend that the administrative law judge denied plaintiff's request for a State-paid Spanish interpreter because of an intentional animosity towards people who do not speak or

understand English. Nor is there any claim that SAPA § 301(6)'s failure to provide interpreters at State expense is attributable to any animosity towards such people. The absence of any claim of intentional discrimination is fatal to a valid Equal Protection claim. As the Supreme Court has most recently stated in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 195 (2003) (emphasis added), speaking in the context of racial discrimination:

> We have made clear that "[p]roof of racially discriminatory intent or purpose is required" to show a violation of the Equal Protection Clause. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) (citing *Washington v. Davis*, 426 U.S. 229 (1976)). Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification [citations omitted]. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination [citations omitted]. But, as was made clear in *Washington v. Davis*, 426 U.S. 229, and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, **even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.**

Thus, for example, applying this standard, the United States Court of Appeals for the Second Circuit has held that the Equal Protection clause was not violated by the issuance of English-only Social Security benefits

notices, forms and services, notwithstanding the plaintiffs' argument that because they spoke Spanish and had only limited abilities in the English language, there was an adverse discriminatory impact upon Spanish-speaking people (*see, Soberal-Perez v. Heckler*, 717 F2d 36, 41-43 [2d Cir.1983], *cert dnd* 466 US 929 [1984]). Discriminatory intent, not adverse discriminatory impact on a protected class of persons (even if adverse impact might be foreseeable), is essential for an Equal Protection claim (*Soberal-Perez*, 717 F2d at 42). And "[l]anguage, by itself, does not identify members of a suspect class" (*Id.* at 42).

As in *Soberal-Perez*, SAPA § 301(6) does not single out people who, like plaintiff, speak only Spanish (or any language besides English). This statute does not establish an "English-only" rule and indeed, the statute is completely silent as to any language, English or otherwise. Thus, the statute is even further removed from equal protection challenge than other administrative provisions that have been attacked (unsuccessfully) for allegedly preferring English over all other languages (*see e.g., Soberal-Perez*, 717 F2d at 41-43 [rejecting equal protection challenge to social security benefits program notice that was not written in Spanish, even though there may have been a disproportionate adverse impact on Hispanics]. *Cf., Toure v. United States*, 24 F3d 444 [2d Cir. 1994] [rejecting due process challenge to forfeiture notice even though plaintiff's native language was French rather than English]).[2]

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[2] Just as SAPA § 301(6) makes no differentiation on the basis of language, it also makes no differentiation on the basis of national origin. Accordingly (even assuming *arguendo* that language can be synonymous with national origin), it cannot be claimed that DMV intentionally discriminated on the basis of plaintiff's national origin (which, incidentally, is not identified).

2. Plaintiff's Due Process Claims Lack Merit

Insofar as plaintiff claims a due process violation, such claim is also insufficient. Since the DMV administrative hearing has not actually begun, the due process claim is unripe and, even if it had already begun at the time this action was brought, legally insufficient. Plaintiff has not exhausted his available remedies, which include administrative remedies and (if unsuccessful) judicial remedies.

With respect to administrative remedies, the statute could not be clearer: exhaustion is mandatory. Vehicle and Traffic Law § 263 provides in full as follows:

> No determination of the commissioner or a member of the department which is appealable under the provisions of this article shall be reviewed in any court unless an appeal has been filed and determined in accordance with this article. The determination of the appeals board shall be subject to review by the supreme court in the manner provided in article seventy-eight of the civil practice law and rules; provided, however, the refusal of an appeals board to grant a stay pending appeal shall be deemed a final determination for purposes of appeal.

Thus, plaintiff is required to let the administrative hearing take place and conclude, and to appeal any adverse decision to the Appeals Board (VTL §§ 260 *et seq.*) *before* bringing any judicial proceedings. He is not permitted to short-circuit the pending administrative process by bringing judicial proceedings, which might be wholly unnecessary if he prevails during the administrative proceedings (*see e.g., Matter of Giambra v. Commissioner of Motor Vehicles*, 46 NY2d 743 [1978], *affg* 59 AD2d 648 [4th Dept. 1977]; *Matter of Venezia v.*

Administrative Adjudication Bureau of the Dept. of Motor Vehicles, 169 AD2d 1033 [3rd Dept. 1991]).

Furthermore, a plaintiff cannot dress up his claim as one involving constitutional rights in order to use the courts to prematurely assert a claim that should be asserted in an Article 78 proceeding at the conclusion of the administrative process. Where, as here, State law provides a judicial procedural remedy, "that process is due process" (*Lujan v. G & G Fire Sprinklers, Inc.*, 532 US 189, 197 [2001], *rhg dnd* 533 US 912 [2001]). It has long been the law that Article 78 provides an adequate judicial remedy for due process purposes (*C/S Window Installers, Inc. v. New York City Dept of Design*, 304 AD2d 380 [1st Dept 2003], citing *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F3d 877, 880-881 [2d Cir. 1996] [collecting cases], *cert dsmd* 521 US 1140 [1997]. *See also Grillo v. New York City Transit Authority*, 291 F3d 231, 234 [2d Cir. 2002]). Moreover, the fact that the claim is alleged to arise under the Constitution is not pertinent to whether Article 78 is an adequate judicial remedy; clearly it is (*Hellenic American*, *supra*, 101 F3d at 881).

Finally, it is not disputed that plaintiff is free to use his own Spanish interpreter at the DMV administrative proceeding. In reality, the sole aspect of SAPA § 301(6) that plaintiff is complaining about is the fact that because he is not a deaf person, he—as opposed to the State—would have to pay for an interpreter. Notably, plaintiff does not contend that he is financially unable to do so. In essence, plaintiff's argument reduces itself to the assertion that the United States Constitution's due process clause entitles every litigant who is being sued by the State to have the State pay the litigant's expenses in defending himself. Contrary to plaintiff's suggestion, the due process clause does not do so. *See e.g., Curiale v.*

Ardra Ins. Co., Ltd. (88 NY2d 268, 274-275 [1996] [unlicensed reinsurer was not deprived of due process by statutory requirement that in order to defend itself in a civil action, reinsurer had to post security in excess of $10 million even though reinsurer claimed financial inability to do so]); *Matter of Top Tile Building Supply Corp. v. New York State Tax Commission* (94 AD2d 885, 886 [3rd Dept.] [holding that Tax Law § 1138(a)(4), which deprives court of jurisdiction to hear appeal from adverse administrative determination unless the taxpayer first pays the amount of the tax, penalty and interest, or an undertaking, does not violate due process], *app dsmd* 60 NY2d 653 [1983], *app dsmd* 465 US 1095 [1984]). Indeed, the same tax statute involved in the *Top Tile* proceeding was sustained against a due process challenge, notwithstanding the taxpayer's claim that it was financially unable to pay the tax or file an undertaking in order to seek judicial review (*Matter of R & G Outfitters, Inc. v. Bouchard*; 101 AD2d 642 [3rd Dept 1984]). In short, the claim that the United States Constitution enables a litigant to be free of the financial obligations in defending itself cannot be sustained. *See also Sea Lar Trading Co., Inc. v. Michael* (94 AD2d 309, 313-314 [1st Dept], *app dsmd* 60 NY2d 860 [1983]).[3]

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[3] In *Sea Lar Trading*, the Appellate Division, First Department, rejected a similar claim that due process barred an administrative regulation that required a taxpayer to pay the disputed tax as a condition precedent to obtaining judicial review of the taxing agency's action (94 AD2d at 313-314), citing *inter alia* the Supreme Court's decisions in *United States v. Kras* (409 US 434 [1973] [not unconstitutional to require advance payment of fees in order to obtain a bankruptcy discharge]), and *Ortwein v. Schwab* (410 US 656, *rehearing dnd* 411 US 922 [1973] [statute requiring payment of a fee as a precondition to state appellate court review of a welfare agency's determination *held* not violative of due process]).

(*footnote continued*)

3. There Is No Constitutional Right To Assistance Of Counsel In State Administrative Proceedings

Plaintiff contends that he has a Federal constitutional right to an attorney at the administrative proceeding, and that this "right" was frustrated because his request for a State-paid Spanish interpreter was denied. (As an aside, we note that just as plaintiff does not claim that he is too poor to pay for an interpreter, he also fails to allege that his attorney did not speak Spanish or was otherwise unable, due to the absence of an interpreter, to render competent advice at the DMV hearing.) The problem with plaintiff's right to counsel claim is that its initial premise—that a party to an administrative proceeding has a right *created by the United States Constitution* to be represented by an attorney—is not supported by any precedent.

To the contrary, the United States Constitution does not confer any right to an attorney in State administrative proceedings. The only provision of the Constitution that confers a right to counsel is the Sixth Amendment, which by its terms is limited to criminal prosecutions ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."). The Sixth Amendment right to counsel is simply not implicated in administrative proceedings such

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Since plaintiff was never denied the right to have a Spanish interpreter, but has simply refused to do so at his own expense, his dispute reduces itself to the proposition that the State is constitutionally obligated to pay for his own litigation expenses. Thus, he is effectively challenging the long-standing American rule: "[i]n contrast with other legal systems, such as that in Great Britain, it has now long been the universal rule in this country not to allow a litigant to recover damages for the amounts expended in the successful prosecution **or defense** of its rights" (*Mighty Midgets, Inc. v. Centennial Insurance Co.*, 47 NY2d 12, 21-22 [1979] [emphasis added]).

as the DMV proceeding (*see e.g., Matter of Baywood Elec. Corp. v. New York State Department of Labor*, 232 AD2d 553, 554 [2d Dept 1996]; *Matter of Alston v. New York City Transit Authority*, 186 AD2d 649, 650 [2d Dept 1992]; *Matter of Post v. State Department of Health*, 245 AD2d 985, 986 [3d Dept 1997]; *S.E.C. v. Alan F. Hughes, Inc.*, 481 F2d 401, 403 and note 5 [2d Cir. 1973], *cert dnd* 414 US 1092 [1973]).

Nor, more particularly, is there a Federal constitutional right to an attorney in administrative revocation proceedings involving one's driver's license (*Ferguson v. Gathright*, 485 F2d 504, 505-506 [4th Cir. 1973], *cert dnd* 415 US 933 [1974]; *Norton v. Administrative Director of the Court*, 80 Hawaii 197, 908 P2d 545, 548 [Sup Ct Hawaii 1995], *reconsideration dnd* 80 Hawaii 357, 910 P2d 128 [1996]).[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should declare that the provisions of the United States Constitution cited by plaintiff (equal protection, due process, and right to counsel) do not confer

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[4] It should be noted that although plaintiff was issued an appearance ticket (Stipulation of Fact ¶ 1), the ticket did not commence the administrative proceeding, since the ticket is merely the accusatory instrument that commences a *criminal* proceeding (*see* Criminal Procedure Law § 100.05). The administrative proceeding was commenced by DMV's issuance of a notice of an administrative hearing (Stipulation of Fact ¶ 5). DMV's rules provide that administrative hearings are conducted pursuant to DMV rules concerning *inter alia* who may represent the respondent, evidentiary matters, and discovery (15 NYCRR §§ 127.4 and 127.6). Neither the CPLR (except with respect to its provisions concerning issuance of subpoenas) or the CPL is binding in the administrative proceeding (15 NYCRR § 127.11).

upon him the right to a Spanish interpreter at State expense at the DMV administrative hearing. Plaintiff is free to have his own interpreter at the hearing, at his own expense.

Respectfully submitted,

Eliot Spitzer, Attorney General of the
State of New York
Attorney for defendant

Dated: January 28, 2005

By: RALPH PERNICK
Ralph Pernick,
Assistant Attorney General
200 Old Country–Suite 460
Mineola, New York 11501-4241
516/248-3312

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index No. 04/16050

OBDULIO SANDOVAL,

Plaintiff,

—against—

RAYMOND P. MARTINEZ, in his Official capacity as Commissioner Department of Motor Vehicles of the State of New York,

Defendant.

PLAINTIFF'S OPPOSITION TO MOTION OF DEFENDANT, IN SUPPORT OF REQUEST FOR DECLARATORY JUDGMENT

STATEMENT

This is a civil action seeking a declaratory judgment and equitable relief to prevent deprivation, under color of law of the State of New York, and under the Federal Constitution, of the privileges and immunities therein. The Plaintiff seeking the right to have an interpreter appointed by the State of New York to assist at a hearing before the Department of Motor Vehicles, convened for

the purposes of determining the revocation of the license of the Plaintiff to operate a motor vehicle in the State of New York.

Such request was denied him by the Administrative Judge of the Motor Vehicle department, on January 20, 2004. The denial of the request was on the basis and authority of sec. 301 of State Administrative Procedure Act (hereinafter referred to as SAPA).

It is the contention of the Plaintiff that such denial on the authority of sec. 301 SAPA is repugnant to the Constitutions of the State of New York and the United States Constitution as more fully spelled out below.

The Plaintiff herein is not asking for monies of any kind. He most simply asks of this court that he be given the rights guaranteed to him by the Constitutions of the State of New York, and the Federal Government; that he be afforded the dignity of being a person within the compass of the edicts of those documents which are the bedrock of the liberties we so diligently strive to adhere to, and indeed fight for. It is the basic right to be heard, properly heard.

It is respectfully submitted that in its memorandum of law submitted by the Defendant seeking to dismiss the complaint of the Plaintiff, seeking a Declaratory Judgment declaring that the "Plaintiffs claims of Constitutional Violations lack merit", the Defendant is, in part of its memorandum, a bit off course. Plainly stated, the Defendant, as will be demonstrated apace, argues the Vehicle and Traffic Law, which is not the source of the constitutional problem. Sec. 301 SAPA, was, and is, the only statute before this court for construction as to its constitutionality.

Where the facts are undisputed, as herein, and the question involves the constitutionality of a statute, a Declaratory Judgment is the proper vehicle to test the

constitutionality of the statute. *Bunis v. Conway,* 17. A.D. (2d) 207, 234 N.Y.S. (2d) 435,437, 438 and cases therein cited; *Matter of Top Tile Building Supply Corp, v. New York State Tax Commission,* 94 A.D. (2d) 885, 463 N.Y. S. (2d) 558

ARGUMENT

POINT I

DEFENDANT'S ARGUING OF VEHICLE & TRAFFIC LAW IS MISTAKEN

The Defendant argues at some length that section 263 Vehicle & Traffic Law controls any remedies for the Plaintiff. To put it bluntly, the Defendant is not only in the wrong pew, it is in the wrong church. Plaintiff decries the denial of his fundamental constitutional rights by application of sec. 301 SAPA. There never was a hearing held, given the posture taken by the Administrative Judge resting on the authority of sec. 301 SAPA to deny the request of an interpreter. It is the stricture of that statute, and that statute alone that is before this court.

In the cases cited by the defendant in point 2 of its argument almost all relate solely to Article 78 proceedings, nothing to do with sec . 301 SAPA. Indeed, in one of the cases cited by the Defendant seeking support for its position, *Matter of Top Tile,* (supra), the court expressly stated "It has consistently been held that a proceeding under Article 78 is not the proper vehicle to test the constitutionality of legislative enactment. . . . However, this court may and in reliance on CPLR 103 (c) . . . remedy the procedural infirmity by converting the article 78 proceeding to a declaratory judgment action..."

It is not meant to belabor the point. Sufficient to say that the argument of the Defendant in its point 2, has nothing to say about the matter now pending before this court, which is, again, sec. 301 SAPA.

POINT II

PLAINTIFF HAS AND IS DENIED EQUAL PROTECTION OF THE LAW

The Defendant argues that absent a "showing of intentional discrimination" a cause of action for denial of equal protection of law requires "purposeful discrimination as a necessary element". In support of such position Defendant cites, *People v. New York City Transit Authority* 59 N.Y.(2d) 343; 465 N.Y.S. (2d) 502; *Matter of 303 West 42nd St. Corp. v. Klein*, 46 N.Y. (2d) 686, 416 N.Y.S. (2d) 219; *City of Cuyahoga Falls, Ohio, v. Buckeye Community Hope Foundation* 538 U.S. 188 (2003)

Unfortunately, it is submitted, the cases cited do not support the position of the Defendant. Indeed in *Matter of 303 W.42nd St. Corp.* (supra) Judge Fuchsberg said on page 695-696:

> "Ordinarily, however, a strong inference of illicit motive will be all that can be expected, because admission of intentional discrimination is likely to be rare. . . law enforcement officials are unlikely to be avow that their intent was to protect constitutionally proscribed discrimination . . . Therefore, because of the right to be free from impermissible selective enforcement must be of more than theoretical value, the burden of demonstrating a violation, albeit heavy, must not be so heavy as to preclude any realistic opportunity for success . . .

a petitioner must show that he is more likely to succeed on its merits."

Moreover, *Peo. v. N.Y. City* (supra) holds no breath for the Defendant.

In the above case, Judge Meyer speaking for the court in a matter relating to an action brought by female employees of the Transit Authority over a regulation of the Authority to use seniority as basis for advancement to dispatcher. Since women were just barely admitted into the ranks of drivers but three years before, they could not qualify for such advancement. They instituted suit under the Human Rights law of New York and Constitution. The Court of Appeals modified the Appellate Division order by reinstating the cause of action on the part of the women as viable under the Human Rights law, but as there was no allegation of present intent to discriminate set out in the pleadings, held that equal protection claim was insufficient in that claim. However, and it somehow may have escaped my learned adversary, Judge Meyer dismissed that portion of the complaint, without prejudice of the right of the People to amend its complaint.

Since, the People had sufficient victory under the Human Rights law, they, of course, proceeded in that vein. But, no where did Judge Meyer rule out Equal Protection of the law as a valid cause of action.

In the *City of Cayhoga* case (supra) again it is submitted the Defendant is off the mark. In *Cayhoga*, what the Supreme Court of the United States had before it was a case involving a "referendum". By submitting the question of housing to a referendum, as required by statute in Ohio, such appeal to voting cannot be interpreted as "intent", and despite statement made by private persons, the procedure followed was neutral, Hence no

question of equal protection. That is all the case stands for.

As to the proposition advanced by the Defendant, that intent be a necessary ingredient of the claim of denial of equal process, (which, of course is but only one of the elements of the case for Plaintiff) an answer is well found in the opinion of Judge Fuchsberg in *303 W. 42nd Street,* intent can be the product of indifference, avoidance, overlook. The State could not, and would not, stand up and say that there is an intent. Why should they? If they did the State might have to face the fact that those unfortunates hailed into court before an Administrative Judge may ask the assistance of an interpreter to defend themselves in any number of State Agencies. The answer is to be found in the Constitution. The Constitutions speak of the rights of the people to stand properly before a court constituted by the State in a charge brought against them, and to be able to properly defend themselves. It was for this purpose that "Governments of the People, for the People, by the People" was founded. It is up to the governments so established to provide the means necessary for the advancement of those rights of the People, as their part of the bargain of this our Democracy. And this involves possible outlays of money. And so indeed it may involve money. As Judge Fuchsberg stated quite succinctly at page 695, supra, thus the burden to establish the violation of such right, "while heavy", . . . "must not be so heavy as to preclude any realistic opportunity for success".

The guarantee of right of to the persons who are in the United States, means that no state, agency of the State, legislature, executive or official no instrumentality of the State, no person, officer or agent exerting the power of the State shall deny equal protection of the laws to any person within the jurisdiction of the State. *Virginia*

v. Rives 100 U. S. 313, 318; *Minneapolis Railway Co. v. Beckwith* 129 U. S. 26, 28, 29.

What is being denied to the Plaintiff is equal access to the Court, in the sense that he stands uniquely deaf to the court where his fundamental rights are being considered and his rights can be taken from him; he is deaf, functionally deaf as to what is going on about him. One could shout in his ear and he would be deaf as to what is shouted. He could give the Court Emma Goldman's credo on the Statute of Liberty, "Give me your poor, your homeless, yearning to be free, I hold my lamp beside the Golden Door", and the Judge would not understand him.

The Plaintiff is Spanish speaking. He has limited ability to speak and understand English. For all practical purposes, in a court where he is the accused, he is deaf for the purposes of the hearing. The purpose of a hearing is to be able to understand what is taking place about the person, to be able to participate in the proceedings. The accused in not inanimate, he is a person who sits before the court where his future is being adjudicated, yet he is apart, deaf to the words spoken of him, about him.

Section 301 SAPA expressly states that the accused is entitled to a hearing. The statute further provides that when "deaf" persons appear at an adjudicatory hearing, qualified, certified interpreters are required. Not only are interpreters required, but they must be qualified and certified. Not just anyone can be an interpreter, and the State recognizes that such person be qualified and certified. Not just a friend, a passerby, but a qualified, certified interpreter.

On that score, the Plainiff has been denied his rights.

As Judge Weinstein observed in *U.S. v. Mosquera*, 816 F. Supp. 171, 175,;

> "Each English speaking "citizen" of the United States is outraged and belligerent when he reads of problems encountered by a fellow citizen involved innocently or otherwise in a crime in a foreign country . . . sentenced in the 'foreign' legal. . . system . . . and not able to understand any of the testimony offered against him.".

The purpose of providing an interpreter to an organically deaf person was to put such person in a position to relate and respond the the hearing world about him. The full coercive power of government is face to face with the accused, and if he cannot defend himself in the court, he is deaf to the words swirling around and about him. It is the inequality of treatment, then, to stand in court, unable to speak in a tongue which can be understood, nor receive any communication in a tongue he can understand. The question then comes round once again, is that person before the court, functionally deaf? Isn't that an inequality in treatment in the Court? *Neal v. Delaware*, 103 U.S. 370

If the State is indifferent to the effect of its statutes, such indifference is as malicious as a stated deliberate intent. Worse, since the State turns a blind eye on what is done in its name, and under its power, the State becomes a passive actor. A State cannot avoid the impact of its action in violation of the 14th Amendment.

POINT III

THE FACT OF THE ASSISTANCE OF COUNSEL AT A HEARING MANDATED MANDATES THAT SUCH ASSISTANCE BE IN KEEPING WITH DUE PROCESS

In its Point 3 of its argument Defendant insists there is no constitutional right to assistance to counsel in the Tribunal called for by the Defendant to try the accused.

But the plain fact is that the accused is given the right to be represented by counsel in such hearing. In the Notice of Hearing to the Plaintiff by the Dept. of Motor Vehicles, copy of which is annexed hereto, it is expressly set forth "You are permitted to appear with counsel"

The purpose of the notice is to have a hearing. Sec. 301 SAPA, states in part:

1. In an adjudicatory proceeding all parties shall be afforded an opportunity for hearing within a reasonable time.

6. Whenever any deaf person is a party to an adjudicatory proceeding . . . such agency shall appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to, and the testimony of, such deaf person. The agency conducting the adjudicatory proceeding shall determine a reasonable fee . . . which shall be a charge upon the agency.

In its papers, the Defendant, as an aside, notes that the plaintiff does not claim to be "too poor to pay for an interpreter", and further, no claim that his attorney "did

not speak Spanish", in order to be able to render competent advice to the client.

Rights afforded a person under the Constitutions, State and Federal, are not dependent on the means of the accused. Money, or the lack thereof, is not the basis on which this, our constitution, was founded. There is nothing in the statute which compels or defines a means test. Moreover, what does "poor" mean? Who is to judge "poor"; what standards are to be observed in any determination of "poor"?

In support of Defendant's contention of no constitutional right to counsel at the adjudicatory hearing brought on by the State against the Plaintiff, the Defendant posits for its support, *Matter of Baywood Elecrtric Corn., v. New York State Department of Labor,* 232 A.D. (2d) 553, 649 N.Y.S. (2d) 28. It is submitted that such citation is no authority for the proposition advanced by the Defendant.

In *Matter of Baywood* (supra) an Article 78 proceeding, the petitioner claimed that its request for adjournment to obtain counsel for what the court determined was an "administrative proceeding" (not an adjudicatory hearing as is the instant matter), there was a hearing held before a Hearing officer, who found against the petitioner. The Hearing officer's recommendation against the petitioner was upheld by the Commissioner of Labor. The petitioner (Baywood) thereafter commenced the Article 78 proceeding.

The Appellate Court affirmed the finding of the Commissioner of Labor, and noted that the delinquency of Baywood in failing to have counsel when it could have, and that it further failed to have the Hearing officer's determination reviewed by counsel, and submit "proposed findings of fact and conclusions of law" was not

such a claim of denial of counsel as a fact, but rather one of calculated delay on the part of the petitioner.

Such case can hardly bear the proposition advanced by the Defendant. Not one word in the decision as the right and function of counsel at such adjudicatory hearing, and the right of the accused to be able to freely communicate with his counsel.

The function of counsel for an accused at an adjudicatory hearing is not only Constitutionally protected, it is a right acknowledged by the Department of Motor Vehicles itself in its Notice to the Accused (Plaintiff).

POINT IV

DENIAL OF AN INTERPRETER AT HEARING IS A DENIAL OF DUE PROCESS

An accused has a constitutional right to present as defense in his own behalf This is one of the fundamentals rights on which our country was founded. And so it is recognized. *Washington v. Texas,* 338 U.S. 14, 19

The hearing before DMV is pursuant to a criminal information filed against the Plaintiff, and is in furtherance of such complaint as set forth in the notice, the "hearing will be held pursuant to section 1194 Vehicle and Traffic Law. . ." The statute makes out a misdemeanor charge against the Plaintiff. He is further advised that he has a right to plead "guilty". Guilty to what? A breach of the criminal code. In *Matthews v. Eldridge* 424 U.S. 319,335, the Supreme Court of the United States set forth three factors that normally determine whether an individual has received a "process" that the Constitution finds as "due".

> "First, the private interest that will be affected by the official action, second, the risk of an erroneous

deprivation of such interest through procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substituted procedural requirement would entail".

It is only by considering these concerns that courts can determine whether the State has met the "fundamental requirement of due process, the opportunity to be heard at a meaningful time and in a meaningful manner" *Matthews v. Eldridge.* (supra at page 333). "If a witness is incapable of communicating in English, the right to have his testimony translated into an intelligible language is part of his right". *Benjamin v. Greiner,* 296 F. Supp (2d) 321, 333.

It is, of course, noted that the Supreme Court did not hold due process solely to criminal related matters, the inclusion is for any time when "a private interest will be affected by official action".

In the instant matter, there can be no dispute that the question of licensure to operate a motor vehicle is of vital importance. Those who live in suburban or exurban surroundings depend on private vehicle transportation for their very existence and sustenance. Deprive such person in such surroundings of the right to a license to operate a motor vehicle, is to condemn such person to a slow, insidious deterioration of mind and body.

Can there be any dispute, that where an accused is voiceless in any such hearing, the outcome can not only be erroneous, such outcome would offend any sensibility of fair play, let alone due process.

When we have the awesome coercive majesty of the power of the state deciding on the imposition of a Draconian sanction, the Defendant herein would have the

burden of due process shifted away from the responsibility of the State to the accused, to patch up a defense, if he has the money, friends, or what have you. The Defendant in its oral argument raised the spectre of Costs. Does the possibility of Cost outweigh the Constitutional rights of a person hailed before a State tribunal to stand trial with the possibility of doing him harm?

Judge Weinstein in *U. S. v Mosquera,* (supra) at page 176 said "Costs alone do not override constitutional rights see *Gideon v. Wainwright,* 372 U.S. 335. . . If the government cannot afford to provide due process to those it prosecutes, it must forgo the prosecution". It is not incumbent on the accused to provide the casket for his own funeral. It is the obligation of the State to provide the procedures necessary so that Due Process can be observed and maintained.

CONCLUSION

From all of the arguments advanced by the Plaintiff opposing the motion of the Defendant seeking dismissal of the complaint, such motion should be denied. Further, if the motion is denied, Plaintiff requests a finding in his favor that section 301 State Agency Procedures Act is unconstitutional, and the State is enjoined from further prosecution of said proceeding against the Plaintiff.

Respectfully submitted,

_____

George Nager, Esq.
Attorney for Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index # 04-16050
Dunne, J.S.C.

Return Date: February 18, 2004

OBDULIO SANDOVAL,

Plaintiff,

—against—

RAYMOND P. MARTINEZ, in his official capacity as Commissioner, Department of Motor Vehicles of the State of New York,

Defendant.

DEFENDANT'S REPLY MEMORANDUM OF LAW

Defendant New York State Department of Motor Vehicles ("DMV") respectfully submits this reply memorandum of law in support of its motion to have this Court declare that State Administrative Procedure Act ("SAPA") § 301(6) is not violative of plaintiff's equal protection or due process rights, or his right to counsel, under the United States and New York Constitutions. Defendant: (a) first highlights those matters not in dispute; then (b)

points out various matters that plaintiff neither addresses nor refutes; and finally (c) responds to the arguments made in plaintiff's February 9, 2005 Opposition ["P/O"].

1. Common Ground

The parties agree: (a) as to the material facts [*see*, CPLR 3222 Submission attached to defendant's January 28, 2005 memorandum of law ("D/M")]; and (b) that a declaratory judgment action is the proper vehicle to challenge the constitutionality of a statute [P/O, page 2].

2. Matters Ignored By Plaintiff

In its initial papers, defendant pointed out the following matters, which plaintiff has neither addressed nor refuted:

a. Plaintiff does not claim that the DMV's administrative law judge denied plaintiff's request for a translator because of any animus towards Spanish-speaking persons [D/M, pages 2 and 4].

b. Plaintiff does not claim that when the State Legislature enacted SAPA § 301(6) to provide for deaf interpreters at State expense, it did not also provide for translators (of any language) at State expense because of any intentional animus against people who don't speak or understand English [D/M, page 4].

c. Plaintiff does not claim that if he had he brought his own translator to the hearing, the translator would have been excluded [D/M, page 7].

d. Plaintiff does not claim that his financial condition has any relationship to his failure or refusal to bring his own translator to the hearing [D/M, page 7, and page 8 note 3].

e. Plaintiff does not claim that his attorney at the DMV hearing did not speak Spanish, or—as a result of not being able to speak Spanish—in fact did not render competent advice to him [D/M, page 9].[1]

3. Defendant's Response To Plaintiff's Legal Arguments

A. Overview

As an overview, defendant emphasizes that the sole issue before this Court is whether any of the three constitutional provisions upon which he relies (equal protection, due process and right to counsel) confers upon him the right to compel the State to provide him with a translator (at State expense) at the DMV administrative hearing. Plaintiff recognizes that no statute or regulation confers such right upon him.

In essence, plaintiff is attempting to use this Court as a super-legislature to create a right with potentially broad financial impact on the State, since his arguments (if accepted) would appear to be applicable to all State administrative agencies (not only DMV), and would involve a plethora of foreign languages (not merely Spanish) in light of the State's continuing history as a melting-pot for people of numerous backgrounds. The creation of such right, however, is a role for which the judicial branch in general is ill-equipped to exercise, and more particularly is not a role for lower courts but is reserved for the Court of Appeals (*People v. Keta*, 165

[1] - Plaintiff's request for the translator was made at the first hearing date (January 20, 2004), but the hearing did not then go forward, for reasons unrelated to the translator issue [Submission ¶ 8]. There is no claim that anything else happened at the January 20, 2004 hearing.

AD2d 172, 177-178 [2d Dept. 1991], *revd on unrelated grounds* 79 NY2d 474 [1992]). In addition, plaintiff's argument that SAPA § 301(6)'s allowance for State-paid interpreters for deaf persons violates his rights because it does not simultaneously also provide non-English speaking persons with translators, ignores that the legislature is permitted to tackle perceived problems incrementally rather than all at the same time. As acknowledged by the Appellate Division, Second Department in *Rosenfeld v. Isaacs* (79 AD2d 630, 631 [2d Dept 1980] [quoting *City of New Orleans v. Dukes*, 427 US 297, 303 (1976)]:

> "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 US 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. *See, e. g., Williamson v. Lee Optical Co.*, 348 US 483, 488-489 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."

B. Equal Protection

Plaintiff ignores a basic tenet of equal protection jurisprudence: the mere fact that a statute may affect different groups of people differently is legally insufficient to give rise to a viable constitutional equal protection claim. Rather, a specific bad intent is essential.

As the Court of Appeals has recently reiterated (*Bower Associates v. Town of Pleasant Valley*, 2 NY3d 617, 631 [2004] [emphasis added; citations omitted]):

> a violation of equal protection arises where first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. In that [plaintiff] does not allege selective treatment based on race, religion or punishment for the exercise of constitutional rights, it must demonstrate that [defendant] singled out its request for consent to the road-widening permit with malevolent intent.
>
> The "similarly situated" element of the test asks "whether a prudent person, looking objectively at the incidents, would think them roughly equivalent." But even different treatment of persons similarly situated, without more, does not establish a claim. What matters is **impermissible motive**: proof of action with intent to injure—that is, proof that the applicant was singled out with an "evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances."

Thus, an equal protection claim requires two showings: first, that in fact the statute affected similarly situated groups differently, and second, that this different effect was specifically intended. If plaintiff is unable to make both of these showings, the court need not proceed to the next step in the equal protection analysis: whether, under the appropriate level of judicial scrutiny (i.e., rational

basis; strict scrutiny; or some other standard) the intended effect is constitutionally permissible.[2]

Plaintiff's efforts to distinguish the cases cited by defendant are truly desperate. He selectively quotes from *Matter of 303 West 42nd Street v. Klein* (46 NY2d 686 [1979]). The issue before the Court in *303 West 42nd Street* was *not* whether an equal protection claim required

[2] Most distinctions are analyzed under the most deferential standard: rational basis. For example, rational basis is the standard used where the classification is related to disabilities (*Cleburne v. Cleburne Living Center, Inc.*, 473 US 432, 446 [1985]). Moreover, where the classification is to be reviewed under such standard, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification" (*Board of Trustees of the University of Alabama v. Garrett*, 531 US 356, 367 [2001] [quotation marks and citations omitted]). Notably, plaintiff has contended that because he cannot speak or understand English he is functionally deaf and, accordingly, "disabled" [P/O, page 6].

By contrast, distinctions involving racial classifications are analyzed pursuant to the most stringent standard of judicial review: strict scrutiny (*see e.g., Loving v. Virginia* (388 US 1 [1967]), and the government has the burden of proving that the strict scrutiny standard has been met (*see generally, Adarand Constructors, Inc. v. Pena*, 515 US 200 [1995]). Even so, the Supreme Court has specifically held that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose" (*Personnel Administrator of Mass. v. Feeney*, 442 US 256, 272 [1979]).

Finally, distinctions based upon certain classifications (other than race) are analyzed pursuant to a standard less stringent than strict scrutiny, but more exacting than rational basis review. For example, claims of gender discrimination are reviewed under a "heightened scrutiny" standard that, while less exacting than "strict scrutiny", requires a showing that the gender-based classification must " 'serv[e] important governmental objectives,' and 'the discriminatory means employed [must be] substantially related to the achievement of those objectives' " (*Nevada Dept. of Human Resources v. Hibbs*, 538 US 721, 728-729 [2003] [quoting *United States v. Virginia*, 518 US 515, 533 (1996)]).

a showing of intentional discrimination (it clearly does). Instead, the issue in that case concerned an evidentiary matter: what should be the proper "measure of proof required to make out a prima facie case of unconstitutional discrimination in the administering of admittedly valid laws[?]" (46 NY2d at 690). In that proceeding, there was no dispute that an equal protection claim requires a showing of intentional discrimination (the very point for which defendant cited the decision). In explicit language ignored by plaintiff, the Court of Appeals reiterated its prior holdings (46 NY2d at 693 [emphasis added]) that the equal protection clause:

> forbids a public authority from applying or enforcing an admittedly valid law "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances". We have recognized the principle in cases involving the enforcement of the criminal laws (*see People v Acme Markets*, 37 NY2d 326; *People v Goodman*, 31 NY2d 262) and the administrative regulation of public health, safety and morals (*see Matter of Di Maggio v Brown*, 19 NY2d 283; *Matter of Bell v New York State Liq. Auth.*, 48 AD2d 83). To invoke the right successfully, however, both the "unequal hand" and the "evil eye" requirements must be proven—to wit, **there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification** (*Matter of Di Maggio v Brown, supra*, pp 290-291; *Oyler v Boles*, 368 US 448, 456; *Snowden v Hughes*, 321 US 1, 8).

Read in context, the Court of Appeals was not addressing whether an equal protection claim could be asserted where there was no showing of *intended* discrimination. Rather, *303 West 42nd Street* recognized that intentional discrimination had to be shown, and the issue in that case concerned the quality of the evidence that the party alleging intentional discrimination had to muster in order to be entitled to a hearing on the essential element of intent.

Similarly misleading and disingenuous is plaintiff's paraphrasing of *People v. New York City Transit Authority* (59 NY2d 343 [1983]). Plaintiff ignores the Court of Appeals' insistence that an equal protection claim is legally insufficient unless the plaintiff can show "purposeful discrimination" by the defendant (59 NY2d at 350). Since in that case the equal protection claim was dismissed for the very reason that there was "no specific allegation of an intent to discriminate" (*id.*), it is unclear at best what point plaintiff is trying to make by noting that the dismissal was without prejudice to amendment (as plaintiff contends [P/O, page 4]); any amendment would still have had to show intentional discrimination.

Furthermore, it is highly significant that *People v. New York City Transit Authority* cites to the Supreme Court's decision in *Personnel Administrator of Mass. v. Feeney* (442 US 256 [1979]). In *Feeney*, the Supreme Court upheld, against an equal protection challenge, a State statute that gave veterans preferential treatment over non-veterans with respect to civil service employment opportunities. Since historically more men have been in the military than women, the statute had the incidental effect—but not the intended purpose—of disadvantaging women. The women plaintiffs lost their lawsuit, because even though the statute had a disproportionate impact on women, this impact was not

intended; the legislative intent was to benefit veterans as opposed to non-veterans, and there was no intent to benefit men over women. Thus, the statute did not violate the equal protection clause.

Indeed, in rejecting the view that intent to discriminate (for equal protection purposes) could be inferred from the maxim that one intends the natural consequences of one's actions, *Feeney* sets forth the vital distinction between intentional discrimination and disparate impact (442 US at 278-279):

> The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.
>
> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Plaintiff's attempted rejection of the Supreme Court's decision in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation* (538 US 188 [2003]) is bizarre, since plaintiff recognizes that in that case, the

City of Cuyahoga could not be deemed to have intended to discriminate when, "as required by statute" [P/O, page 4], it submitted an issue concerning low-cost housing to a public referendum. Similarly, the defendant (DMV) could not be said to have intended to discriminate when the relief plaintiff was seeking at the hearing (a translator at public expense) was not authorized by statute, and would have involved the outlay of State money without statutory authority for DMV to do so. Indeed, the Appellate Division, Second Department has expressly rejected a claim that DMV acted arbitrarily and capriciously when it failed to reissue a driver's license because the applicable statute provided it with "no discretion" to do so under the circumstances (*Matter of Rosato v. New York State Dept. of Motor Vehicles*, 7 AD3d 718 [2d Dept 2004]). *See also Matter of Giambra v. Commissioner of Motor Vehicles* (59 AD2d 648, 649 [4th Dept 1977] ["Commissioner has no discretion in carrying out the mandatory statutory duty"], *affd* 46 NY2d 743 [1978]).

There is no claim that when the State Legislature enacted SAPA § 301(6) and thereby gave a benefit to deaf people (interpreters at State expense), its failure to also give a similar benefit to non-English speaking persons (translators at State expense) was specifically intended to treat non-English speaking persons at a disadvantage relative to deaf persons. Nor has plaintiff produced any evidence to that effect. Accordingly, an equal protection claim is precluded, and this Court should declare that by failing to authorize a State-paid translator as requested by the plaintiff, SAPA § 301(6) does not violate plaintiff's equal protection rights under either the United States or State Constitutions.[3]

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[3] The three Supreme Court cases cited by plaintiff are of limited utility here. Two of them (*Virginia v. Rives*, 100 US 313 [1879],

C. Due Process

Plaintiff's due process arguments utterly ignore defendant's showings [D/M pages 6-8] that: (a) his claims are not ripe until and unless the DMV administrative hearing is concluded; (b) he is precluded by statute (VTL § 263) from making a pre-hearing challenge to the adequacy of the hearing procedures (i.e., his claim for a State-paid translator), and must first exhaust his administrative remedies; (c) the fact that there is an adequate post-hearing judicial remedy via Article 78 precludes, as a matter of constitutional law, a due process claim (*see, Lujan* v. *G & G Fire Sprinklers, Inc.* 532 US 189, 197 [2001]); and (d) it is not a deprivation of due process to require a defendant to pay his own expenses of defend-

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and *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 US 26 [1889]) are merely cited for the unremarkable and unhelpful general proposition that the Constitution requires equal protection. Indeed, the *Beckwith* decision upheld the constitutionality of a State statute against an equal protection challenge. *Neal v. Delaware* (103 US 370 [1880]) involved the pre-Civil War Constitution and laws of a State that compelled intentional discrimination (exclusion of African Americans from juries), which the Court held to be essentially superseded in 1868 by the Fourteenth Amendment (which contains the equal protection clause).

The actual holding of *United States v. Mosquera* (816 FSupp 171 [EDNY 1993]) does not support plaintiff. *Mosquera* was a massive *criminal* prosecution involving 18 Spanish-speaking defendants, each of whom had separate counsel (10 of the attorneys were privately retained.) The single translator could not adequately do her job in light of the complexities of the case and the number of attorneys and defendants (816 FSupp at 170). While Judge Weinstein required the indictment, thousands of government documents, and transcripts of hundreds of hours of wiretaps to be translated at governmental expense, the Court specifically also ruled that "[d]efendants who have private counsel shall pay for their own translations and out-of-court interpreters unless the court orders otherwise" (816 FSupp at 177). It should also be noted that in *Mosquera* , there was no request for the actual trial testimony to be translated at Government expense, and the Court's order did not so provide.

ing himself, unless there is a claim of indigency (which plaintiff has refused to make).

i. Plaintiff Has Elected To Pursue Only A Facial Challenge To The Constitutionality of SAPA § 301(6)

Plaintiff takes the position that since there is (allegedly) a constitutional right to have State-paid translators at DMV administrative hearings, his financial situation is irrelevant. Indeed, he has steadfastly refused to rely upon his own financial condition (whatever it might be; plaintiff has not provided any evidentiary information). Thus, plaintiff has not provided any basis to claim that SAPA § 301(6) *as applied to him* is unconstitutional. To the contrary, by refusing to provide any information as to his own financial situation and by arguing that his personal financial condition is irrelevant, plaintiff's claim is solely that *on its face*, SAPA § 301(6) is unconstitutional.

The distinction between an "as applied" challenge and a facial challenge to a statute's constitutionality has great legal significance. As the New York Court of Appeals has expressly held (*Cohen v. State*, 94 NY2d 1, 7-8 [1999]):

> Because the plaintiffs seek facial invalidation of [the statute], they must initially overcome the presumption of constitutionality accorded to all enactments of a co-equal Branch of government. In seeking facial nullification, plaintiffs bear the burden to demonstrate that "in any degree and in every conceivable application," the law suffers wholesale constitutional impairment (*McGowan v Burstein*, 71 NY2d 729, 733).

See also United States v. Salerno (481 US 739, 745 [1987]) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.")

SAPA § 301(6) is not facially unconstitutional by failing to provide a State-paid translator to every respondent in an administrative proceeding, regardless whether each such respondent can or cannot afford an interpreter on his own. Indeed, it is undisputed that plaintiff would have been allowed to have a friend, relative or anyone else act as his translator (without charge). Given the fact that plaintiff is making a facial challenge to the statute, plaintiff's burden is twofold: (1) he must show that *no* respondent would ever be permitted to have another person act as the respondent's translator; and (2) he must also show that even if a respondent in the DMV is independently wealthy and can easily afford to pay for his own translator, the State must nevertheless pay the expense notwithstanding the American rule that a defendant's litigation expenses are to be borne by the defendant [D/M, page 8 and note 3]. Since plaintiff has not made these required showings, his facial challenge to SAPA § 301(6) cannot be maintained.[4]

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[4] Plaintiff does not dispute that his burden of proving the statute unconstitutional is nothing less than "beyond a reasonable doubt" (*see* D/M, page 2. *See also, LaValle v. Hayden*, 98 NY2d 155, 161 [2002] ["Legislative enactments enjoy a strong presumption of constitutionality (*see Paterson v University of State of N.Y.*, 14 NY2d 432, 438 [1964]). While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt' "]).

ii. Plaintiff's Implicit Position—That Due Process Never Permits A Suspension Prior To An Evidentiary Hearing—Is Simply Wrong

Plaintiff suggests that in all cases, due process mandates that no administrative suspension of, or other restriction on, a government-conferred license can take place until *after* there has been an evidentiary hearing. This implicit argument has been raised and rejected by controlling authority.

It should be noted at the outset that plaintiff has been accused of driving while under the influence of alcohol or drugs. In such circumstances, where there is an obvious potential risk to the public health and safety, the Supreme Court of the United States has expressly found summary suspension of a driver's license prior to an evidentiary hearing to comport with due process (*Mackey v. Montrym*, 443 US 1 [1979] [upholding constitutionality of State statute imposing a 90-day summary suspension without a prior hearing]; *Dixon v. Love*, 431 US 105 [1977] [upholding constitutionality of State statute authorizing a pre-hearing summary suspension that could last as long as one year]). Similarly, the Court of Appeals has also rejected a due process challenge to the constitutionality of the Vehicle and Traffic Law's summary suspension provisions [VTL § 1193(2)(e)(7)], which provide for a *mandatory* pre-hearing suspension of a driver's license upon a showing that the driver has been charged with driving while intoxicated, the criminal accusatory instrument is sufficient on its face, and there is reasonable cause to believe that the driver operated a vehicle while having a blood alcohol level in excess of a specific amount stated in the statute (*Pringle v. Wolfe*, 88 NY2d 426, *cert dnd* 519 US 1009 [1996]).

The statutory procedures applicable to the present case provide sufficient safeguards to comply with due process, which emphasizes the general reliability of the process rather than the correctness of the result in a specific case (*see*, *Mackey*, *supra*, 443 US at 13 ["The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations. . . . [W]hen prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be."]). There are numerous procedural safeguards in the instant circumstances. First, if the ALJ rules adversely to the license-holder after the hearing, the license-holder has the right to take an appeal to DMV's Appeals Board [VTL § 261]. Second, upon filing the appeal, the license-holder also has the right to apply to the Appeal Board for a stay of the ALJ's determination, and the stay is deemed granted by operation of law if the Appeal Board does not decide the stay application within 30 days after the appeal is finally submitted [VTL § 262]. Finally—and notwithstanding the usual rule that no judicial review can be sought until all administrative remedies have been sought and exhausted—the license-holder may seek judicial review of a denial of the stay, even if the Appeal Board has not yet decided the merits of the underlying appeal [VTL § 263]. These procedural safeguards are sufficient for due process purposes.

iii. Plaintiff's Specious Claim That The DMV Administrative Hearing Is Pursuant To The Criminal Accusatory Instrument

Plaintiff argues that the DMV hearing "is pursuant to a criminal information filed against the Plaintiff" [P/O at page 8]. It appears that plaintiff makes this misstatement so that he can argue that the same cases that define due process for criminal proceedings constitute binding precedent for his challenge to the DMV administrative proceeding. Not only does plaintiff provide no support for this claim, but also, the claim is expressly contradicted by the notice of the administrative hearing, which expressly states that the administrative hearing is to be held pursuant to VTL § 1194 [Exhibit to P/O]. Furthermore, the notice also expressly states: "This chemical test inquiry is independent of the criminal court case charging you with DWI. . . . Do not assume that a criminal plea or dismissal affects this inquiry" [*Id.*].

It is disheartening to see plaintiff repeat the false claim that the DMV hearing is pursuant to a criminal information, for two reasons: *first*, it is inconsistent with the hearing notice itself (see previous paragraph). *Second*, when plaintiff made the same meritlesss claim in his earlier federal court action (*Sandoval v. Dept. of Motor Vehicles*, 333 FSupp2d 40 [E.D.N.Y. 2004]), defendant showed the falsity of this claim (see next two paragraphs), yet plaintiff persists in advancing it.

Plaintiff ignores the following, which is taken verbatim from defendant's reply memorandum of law in the federal action (Reply Memorandum of Law dated May 13, 2004, page 9 note 5 [certain citations have been omitted]):

> We note, however, that his claim that the administrative hearing "is pursuant to a criminal informa-

tion" is untrue. The criminal misdemeanor information is merely the accusatory instrument that commences the *criminal* proceeding against him (*see* New York Criminal Procedure Law § 100.05). Thereafter, the criminal proceeding takes place in a court having jurisdiction over criminal matters, and is governed by the CPL and other requirements applicable to criminal proceedings. *See e.g. Blanton v. City of North Los Angeles*, 489 U.S. 538 (1989).

By contrast, the administrative proceeding is not scheduled or conducted pursuant to the criminal information, as plaintiff claims. Rather, DMV prepares a schedule of available hearing dates for administrative proceedings involving chemical test refusals and provides the schedule to criminal courts [15 NYCRR § 139.4(a)]. Based upon such schedules the initial administrative hearing is scheduled by the criminal court or by the DMV if the court fails to do so [15 NYCRR § 127.9(a)], and the respondent is given notice of the hearing [15 NYCRR § 127.1]. See appended Notice of Temporary Suspension and Notice of Hearing. The administrative hearing is then conducted, under DMV rules concerning who may represent the respondent, evidentiary rules, and discovery [15 NYCRR § 127.4 and 127.6]. Neither the New York Civil Practice Law and Rules (except with respect to its provisions concerning issuance of subpoenas) nor the CPL is binding in the administrative proceeding [15 NYCRR § 127.11].

iv. Plaintiff's Lack Of Supporting Precedent

In addition to ignoring the Second Circuit's decision in *Soberal-Perez v. Heckler* (717 F2d 36 [2d Cir. 1983],

cert dnd 466 US 929 [1984]), which is discussed in depth by defendant [D/M, pages 4-5], it should also be noted that even in criminal cases, plaintiff's proposition—that as a matter of constitutional right, a defendant is entitled to a government-paid translator even if the defendant has the means to pay for one himself—has been expressly rejected (*see United States v. Desist*, 384 F2d 889, 902-903 [2d Cir. 1967][5]; notably, although the Supreme Court affirmed the convictions in *Desist* on unrelated grounds [394 US 244, *rhg dnd* 395 US 931 (1969)], the Court did find "no merit in any of the petitioners' other challenges to their convictions" [394 US at 246]).

* * * * * *

For the above reasons, this Court should declare that by failing to authorize a State-paid translator as requested by the plaintiff, SAPA § 301(6) does not vio-

[5] The Second Circuit in *Desist* stated as follows (384 F2d at 902-903 [footnotes omitted]):

> In addition, in the posture the issue comes before us, we must assume—and it is a reasonable assumption—that Nebbia was quite able to afford an interpreter and to find a qualified one. Under these circumstances, if the real point is guarantee of a fair trial, it is a little difficult to see why Nebbia is not required to lie in the bed that he made. We are aware that trying a defendant in a language he does not understand has a Kafka-like quality, but Nebbia's ability to remedy that situation dissipates substantially—perhaps completely—any feeling of unease. In other words, if Nebbia denied himself the interpreter and stands on his right to do so, does not the issue become solely who should have paid for one? Moreover, we doubt that Nebbia's claimed absolute constitutional right to an interpreter is stronger than the absolute right to a court-appointed counsel; the latter is held only by the indigent, *Gideon v. Wainwright*, 372 U.S. 335, 339-340 (1963) [other citations omitted].

late plaintiff's due process rights under either the United States or State Constitutions.

D. Right To Counsel

Long on rhetoric but short on precedent (which uniformly goes against him), plaintiff persists in arguing that his supposed constitutional right to an attorney at an administrative hearing will somehow be compromised by the State's failure to provide him a translator free of charge. The short answer to this claim is that the argument's premise is baseless: there is no right conferred by the Constitution (State or federal) to an attorney at an administrative hearing (*see* cases previously cited by defendant at D/M pages 9-10. *See also Matter of Smith v. Passidomo*, 120 AD2d 599 [2d Dept 1986] ["Nor was the petitioner deprived of her constitutional right to effective assistance of counsel. The right to counsel mandated by due process has no application to an administrative proceeding such as this."]).

Plaintiff's right to counsel argument ignores that constitutional rules applicable in criminal cases cannot be woodenly transported to the administrative forum. *See e.g., Matter of Cook v. Adducci* (205 AD2d 903, 904 [3d Dept] ["While indeed, in a criminal proceeding, the failure to comply with a defendant's request for assistance of counsel may result in the suppression of evidence obtained, the same consequence does not apply in the context of an administrative license revocation proceeding."], *lv dnd* 84 NY2d 811 [1994]). Thus, any supposed impairment of plaintiff's attorney's ability to represent him without a State-paid translator is of no legal significance as a matter of constitutional law.

Accordingly, this Court should declare that by failing to authorize a State-paid translator as requested by the plaintiff, SAPA § 301(6) does not violate plaintiff's sup-

posed right to counsel under either the United States or State Constitutions.

4. Conclusion

For the reasons stated by defendant, it is respectfully submitted that this Court should issue a declaratory judgment, declaring that neither the equal protection, due process, or right to counsel provisions of the United States Constitution and the New York State Constitution are violated by SAPA § 301(6)'s failure to authorize the appointment of an English-language translator at State expense at plaintiff's DMV administrative hearing.

Respectfully submitted,

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